



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** The Aydin Corporation; Department of the  
Army--Request for Reconsideration  
**File:** B-224908.3; B-224908.4  
**Date:** May 19, 1987

### DIGEST

1. Prior decision is affirmed where requests for reconsideration filed by the contracting agency and the awardee fail to establish that the prior decision rests upon the protester's material misrepresentation of fact.
2. Recommendation that competitive range discussions be reopened is withdrawn where it is determined upon reconsideration that the remedy is no longer feasible given the extent of contract performance and the critical nature of the requirement to the agency's mission. Protester, however, is nevertheless entitled to its protest costs, including attorney's fees, and its proposal preparation costs.

### DECISION

The Aydin Corporation and the Department of the Army request reconsideration of our recent decision in Loral Terracom; Marconi Italiana, B-224908 et al., Feb. 18, 1987, 66 Comp. Gen. \_\_\_\_, 87-1 CPD ¶ 182, sustaining a protest by Marconi Italiana against the Army's award of a contract to Aydin under request for proposals (RFP) No. DAAB07-86-R-J006. The procurement was for the supply of a quantity of AN/GRC-222(v) variable function radio sets. The radio sets were to be furnished in two specific operational modes, the "(v)1" wide-band and "(v)2" narrow-band configurations, and a prime requirement of the acquisition was that the (v)1 configuration be readily convertible by user personnel to perform functionally as a complete (v)2 configuration.

We sustained the protest as we found that the Army had failed to advise Marconi that technical approaches to effect the convertibility requirement other than strictly by use of a separate conversion kit--the method proposed by Marconi in reliance on the express terms of the RFP--were also acceptable. Aydin's technical approach to accomplish the (v)1/(v)2 reconfiguration was by means of an internal embedded switch. We did not criticize the Army for judging

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that Aydin's concept was superior to the conversion kit approach originally sought by the agency, as reflected in the specific terms of its own solicitation. However, we concluded that the Army's failure to clarify its needs, either through the issuance of a formal written amendment or through competitive range discussions, had misled Marconi to its competitive prejudice.

We recommended that competitive range discussions be reopened to allow for the submission of another round of best and final offers under an amended solicitation clearly stating the Army's needs regarding the (v)1/(v)2 reconfiguration requirement. We further recommended that Aydin's contract be terminated for the convenience of the government if it were not the successful offeror at the conclusion of these discussions.

Aydin and the Army now request reconsideration of our February 18 decision on the principal ground that this Office erred in concluding that Marconi had had no actual knowledge that the (v)1/(v)2 reconfiguration effort could be met by technical approaches other than expressly called for by the solicitation. The Army also contends that Marconi's assertion that the RFP permitted only one conversion methodology was untimely raised and should not have been considered by this Office in resolving the protest. Finally, the agency urges that, even if we should affirm our prior decision from a legal standpoint, our recommendation for corrective action should not be implemented because it clearly will not be in the government's best interest.

We affirm our prior decision but withdraw our recommendation.

The particular details of this case are set forth in our prior decision and need not be repeated at length here. To the extent Aydin and the Army contend that Marconi knew that a separate conversion kit was not required to effect the (v)1/(v)2 reconfiguration, the record does not establish the validity of the parties' contention.

Marconi had argued in its initial protest submission that the Army had, in effect, been biased in favor of the embedded switch approach adopted by Aydin to accomplish the (v)1/(v)2 convertibility requirement during the evaluation of proposals. In its report on the protest, the Army responded to the assertion by stating that the RFP, which sought a nondevelopmental item, had not required any one particular technical approach to accomplish the overall reconfiguration effort, and that Aydin's proposal, therefore, had not been improperly evaluated. However, at the administrative conference convened on the protest, and in

its written submission following that conference, Marconi countered the agency's position by urging that the RFP, by its express terms, had in fact required that the conversion of the radio set from the (v)1 to the (v)2 configuration be effected by means of a separate conversion kit.

Although Marconi furnished a draft copy of its conference comments to the Army two days prior to the December 12, 1986, due date set for the submission of conference comments by all parties, the Army did not file its own conference comments until January 2, 1987. The Army never requested an extension of time to file its comments, and its submission, therefore, was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.5(c) (1986), which provide that comments on any bid protest conference must be filed within five working days of the date on which the conference was held. Nevertheless, even though the Army's filing was late, and the matter at hand already under active review, we did consider the Army's comments upon receipt, but, as noted in our prior decision, we found nothing in them to be material to our conclusion that the RFP required a separate conversion kit.

The Army had argued that a statement in Marconi's technical proposal clearly indicated that the firm knew that a separate conversion kit methodology was not a mandatory requirement of the solicitation. Specifically, Marconi's proposal had provided at section 2.1.1:

"The AN/GRC-222(v) radio will be installed in the existing radio assemblages, modified Radio Repeater Set . . . which will house two . . . (v)1 radio sets and the modified Radio Terminal Assemblage . . . which will house one . . . (v)1 radio set, two . . . (v)2 radio sets, and a conversion kit if needed."

The Army contended at that time, and now contends in its request for reconsideration, that the qualifying phrase "if needed" in the above statement establishes Marconi's misrepresentation on this crucial issue. Accordingly, it is urged that our prior decision, sustaining the protest on the ground that Marconi was not properly advised that alternative methods were permissible, is founded on a material error of fact and should now be reversed. We do not agree.

Our prior decision was based upon our reading of the express language of the solicitation documents, which, as detailed in that decision, were replete with references to a conversion kit requirement, but which made no mention of any other method of (v)1/(v)2 convertibility as being acceptable. Thus, the phrase "if needed" in Marconi's proposal was not viewed at the time of our decision as sufficient to overcome

Marconi's position that a separate conversion kit was mandated by the solicitation, and that the firm, with no clear indication to the contrary, had literally relied upon the RFP's terms in preparing its proposal to its ultimate competitive detriment.

In fairness to all parties on this issue, we have closely reviewed the record in response to the requests for reconsideration now filed, to the extent of obtaining both Marconi's and Aydin's complete proposals for examination, but we are not persuaded by the single phrase "if needed" existing in Marconi's offer that the firm misrepresented its lack of actual knowledge that alternative approaches were allowable. Rather, our review provides additional support for our original conclusion that the Army deviated from the terms of its own solicitation in accepting Aydin's offer which, although perhaps technically superior to Marconi's, was nonetheless noncompliant with the agency's stated requirements.

Marconi explains that the phrase in issue merely referred to those equipment assemblages where no conversion kit was necessary, that is, those shelters housing (v)2 configurations only, since it is only the (v)1 configuration which must be readily convertible to the (v)2 mode, an explanation we find to be consistent with the language used by the protester in its proposal. Marconi urges that it never proposed anything other than a separate conversion kit and, therefore, the language in question "cannot be reasonably interpreted as [Marconi's] 'recognition' that any other means of conversion were acceptable."

Examination of Marconi's proposal supports the firm's position, since it is obvious from the various provisions of the proposal that Marconi intended to offer only a separate conversion kit and, apart from the single phrase in issue, there is no qualifying language to impeach Marconi's representation that it was unaware of the acceptability of alternative approaches to convertibility. For example, under section 2.1.3, "PROGRAM OBJECTIVES," Marconi's proposal states that, "Conversion kits will facilitate conversion of . . . [the] (v)1 configuration to . . . [the] (v)2 configuration by operating personnel." Section 2.2.3.3 describes the three components comprising the "Conversion kit (v)1 to (v)2." Section 2.3.4. specifically provides that the conversion kit offered by Marconi "to effect the . . . said conversion and referred to [in the solicitation documents] as . . . (v)2 Conversion Kit" is Marconi's model CK344 which "contains all the items that must be interchanged in a . . . (v)1 to transform it into a . . . (v)2. . . ."

Thus, we regard the clear import of Marconi's proposal as the offer of a conversion kit approach in accordance with what the firm reasonably regarded as a mandatory aspect of the overall convertibility requirement. The sole qualifying phrase "if needed" cannot be given the materiality Aydin and the Army give it in the face of both the express terms of the solicitation and the provisions of Marconi's own proposal as set forth above.

Moreover, our examination of Aydin's proposal and the Army's evaluation statements regarding that proposal only serve to confirm our view that a conversion kit was, at least as originally contemplated, a firm requirement. In the introduction to its technical proposal, Aydin specifically described its offered AMLD-3 LOS Digital Radio Set as having the capability to be changed from the (v)1 to the (v)2 mode simply by means of switch selection by the operator. In Aydin's words:

"This ease of reconfiguration makes this Digital Radio Set unique in that no Conversion Kit is required to convert the v1 . . . to the v2 . . ."  
(Emphasis supplied.)

The fact that Aydin describes its approach as "unique" reasonably indicates to us that the firm originally perceived the acquisition as one seeking a conversion kit methodology to effect the (v)1/(v)2 reconfiguration. More telling, however, is the following statement from the Army's subsequent evaluation of Aydin's proposal:

"The proposed approach combines the features of the . . .(v)1 and (v)2 into a single radio set, thereby obviating the requirement for a conversion kit. . . ." (Emphasis supplied.)

We read the words "the requirement," as opposed to terms which would convey a more general technical necessity, as referring specifically to the concept of a separate conversion kit as mandated by the terms of the RFP.

The Army, nonetheless continues to assert that Marconi knew that alternate approaches would be considered and insists that Marconi was so advised during negotiations on August 14, 1986. Marconi in turn vehemently denies it was ever made aware that the Army would consider an approach that differed from the one stated in the solicitation--a separate conversion kit. We need not resolve this factual dispute because the Army never amended the RFP and we remain

convinced that the RFP clearly mandated the use of a separate conversion kit.

As noted in our February 18 decision, this Office will resolve a dispute as to the meaning of a particular solicitation requirement by reading the solicitation as a whole and in a manner giving effect to all of its provisions. System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356. In doing so, we assign words and terms their plain meaning, see Wheeler Bros., Inc. et al., B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388, and an agency generally will not be permitted to deny the express provisions of its own solicitation. See Senstar Corp., B-225744, Apr. 2, 1987, 87-1 CPD ¶ \_\_\_\_\_. Thus, to the extent Aydin and the Army continue to argue that the RFP allowed for approaches other than a separate conversion kit to effect (v)1/(v)2 reconfiguration, we continue to reject the argument given the literally dozens of specific references to a conversion kit, but to no other allowable method of convertibility, in the operative solicitation documents.<sup>1/</sup>

We also reject the assertion by Aydin and the Army that the word "kit" encompassed Aydin's conversion approach. The word "kit" is defined as a "packaged set of parts," Webster's Third New International Dictionary, 1971, p. 1246, or a "set of materials or parts." The Random House College Dictionary, Rev. Ed., 1980, p. 739. We see no reasonable manner in which such definitions could be extended to include Aydin's integral embedded switch concept as opposed to the approach offered by Marconi, which, in literal compliance with the terms of the RFP, comprised a "kit" of three modular, exchangeable components.

Accordingly, we affirm our holding that Marconi was misled to its prejudice by the Army's failure to advise the firm that the offer of a separate conversion kit to effect (v)1/(v)2 convertibility was not a requirement of the

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<sup>1/</sup>As noted in our prior decision, the Army's presolicitation documents as provided for industry comment indicated that other methodologies to accomplish the reconfiguration effort might be acceptable, by using such qualified terms as "Conversion Kit (if required)" and "Kit or Method." But Marconi's point all along has been that the RFP and its attachments, when finally issued, had no such qualifying language, and that the firm, without actual knowledge to the contrary, was therefore bound by the terms of the solicitation which repeatedly referenced a conversion kit exclusively.

acquisition. Aydin and the Army have failed to meet their burden as the parties requesting reconsideration to establish otherwise. See Dept. of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

We are not persuaded by the Army's argument that Marconi's assertion regarding the conversion kit issue was untimely raised. As indicated earlier in this discussion, Marconi had urged the mandatory nature of that feature at the bid protest conference, and then in its conference comments, directly in response to the Army's position in its administrative report that Aydin's proposal was not improperly evaluated. We did not view Marconi's response as an attempt to raise a wholly new issue, which had to satisfy independently our timeliness requirements, see Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21 at 14, but rather as a further development of the firm's original protest assertion that its offer had not been fairly considered due to the Army's preference for Aydin's integral switch concept. Therefore, the issue was not untimely and was properly considered in reaching our decision on the protest.

The Army now urges that implementation of our recommendation for corrective action will not be in the government's best interest and that the award to Aydin, therefore, should be allowed to stand. Principally, the Army voices concerns regarding the impact any termination of Aydin's contract would have upon mission needs by advising that the AN/GRC-222(v) variable function radio set sought under this procurement is an integral part of a much larger system, the Tri-Service Tactical Communications System (TRI-TAC), and that TRI-TAC equipment is used by the Army for essential communications for organizational elements above the corps level on a world-wide basis. According to the Army, the AN/GRC-222 is being procured to outfit all signal battalions supporting these elements and that deliveries of the production radio sets must commence no later than January 1988, as contemplated under Aydin's contract, in order not to compromise the overall capability of the TRI-TAC system. The Army states:

" . . . [I]mplementation of the . . . recommendation would cause irreparable harm to the Army because communication capabilities of all theater Army commanders would be significantly degraded for an extended period of time."

The Army believes that if Aydin's contract is terminated for the convenience of the government and the requirement then awarded to Marconi, Marconi will not be able to meet the

necessary delivery schedule so that the radios can be properly fielded to support the TRI-TAC system.

We note that we did not expressly recommend that Aydin's contract be terminated and the requirement awarded to Marconi. Rather, our recommendation was that the impropriety existing in the conduct of the procurement be remedied by the reopening of discussions under a clarified RFP to allow for the submission of a new round of best and final offers.

Nevertheless, we view the Army's concerns that any delays in procuring these radios will have a serious impact upon its mission needs as significant. Performance of Aydin's contract has continued throughout both the original protest resolution process and the present reconsideration period because the protest was not filed within 10 calendar days of the award to Aydin. The Army, therefore, was not required to suspend the work. See 31 U.S.C. § 3553(d)(1). Since the procurement has reached an advanced stage, a reopening of discussions to obtain revised proposals at this point, with the delays to be occasioned by such action, and with the possibility as well that Aydin's contract ultimately might be terminated as a result of those discussions, would not be in the best interest of the government. We are persuaded that a reopening of the competition is no longer a feasible remedy. See 4 C.F.R. § 21.6(b). Accordingly, we withdraw the recommendation for corrective action made in our February 18 decision, and the award to Aydin is allowed to stand. See Leland Limited, Inc.--Reconsideration, B-224175.2, Feb. 17, 1987, 87-1 CPD ¶ 168.

At the same time, however, we find Marconi entitled to its costs of filing and pursuing the protest, including attorney's fees, and its proposal preparation expenses. Protest costs may be recovered where the agency has unreasonably excluded the protester from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). The recovery of proposal preparation costs may be allowed where the protester, having a substantial chance of award, was unreasonably excluded from the procurement, but no other practical remedy is feasible. Id.; see Temps & Co.--Claim for Costs, B-221846.2, Aug. 28, 1986, 65 Comp. Gen. \_\_\_, 86-2 CPD ¶ 236 at 3.

Here we have affirmed our original conclusion that the Army's failure to advise Marconi of the agency's true acquisition needs misled the firm, whose offer in fact was later found to be lower in price than Aydin's and, therefore, unreasonably excluded it from the procurement. The



firm is accordingly allowed the recovery of its protest and proposal costs. Leland Limited, Inc.--Reconsideration, B-224175.2, supra, 87-1 CPD ¶ 168 at 4. Marconi should submit its claim for reimbursement of these costs directly to the Army, and if the parties cannot reach agreement within a reasonable time, this Office will determine the appropriate amount to be paid. 4 C.F.R. § 21.6(f).

Our prior decision is affirmed. Our prior recommendation is withdrawn.



**Acting** Comptroller General  
of the United States